IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 250 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GENERAL STATIONARY MFG. CO. - Petitioner(s)
Versus
J.K. PAPERS LTD. - Respondent(s)

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Appearance :
MR MIHIR H JOSHI for Petitioner(s) : 1,MS AMRITA M THAKORE for Petitioner(s) : 1,
NANAVATI ASSOCIATES for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 12/06/2007

ORAL JUDGMENT

1. Present petition under sections 433 and 434 of the Companies Act, 1956 has been filed by the petitioning creditor for an appropriate order of winding up of th respondent company alleging inter alia that an amount of Rs.56,26,190.52paisa is due and payable to the petitioner which the respondent company has failed and/or neglected to pay and the respondent company is unable to pay the same.
2. It is the case of the petitioner that the petitioner is a small scale industries unit and carries on business of manufacturing exercise notebooks, ledger books, printing etc. and for the purpose of procures paper manufactured by various companies. That the petitioner was desirious of distributing the paper manufactured by the Central Pulp Mills Limited (for short “the CPML”) (now known as J.K. Paper Limited). The petitioner deposited an amount of Rs.3 lacs which as on 31-12-1991 amounted to Rs.4,86,976/- as deposit for sole distributorship. That an additional amount of Rs.8,82,722/- was paid by the petitioner as advance against supplies. Thus, an amount of rs.13,69,698/- was outstanding and due to the petitioner and the said amount was reflected in the accounts books of the company. It is the case of the petitioner that by communication dated 2-1-92

addressed by the Managing Director of the CPML to the petitioner, the said outstanding amount was confirmed. It is also the case of the petitioner that in January, 1992, the CPML was declared sick and a reference was made to the BIFR under the SICA Act, 1985. That on 13-2-92, a communication was addressed by the petitioner to the BIFR for lodging its objections. Thereafter, after hearing all the concerned and affected parties, the scheme was sanctioned on 13-5-92 by the BIFR. When the sanctioned scheme was in operation, a communication dated 2-8-93 was addressed by the petitioner to the President of the CPML calling upon him to make the payment of outstanding dues to the tune of Rs.18,57,354.99paisa along with the interest at the rate of 12% on trade deposit and at the rate of 18% p.a. on advance against supplies. It is the case of the petitioner that the said amount was never disputed by the company. That thereafter, the scheme was in implementation and when the said CPML started making profits, a letter dated 15-3-2001 was addressed by the petitioner through its advocate to the CPML calling upon it to make payment of outstanding dues of Rs.48,74,284/- inclusive of penal interest at the rate of 18% upto 28-2-2001. However, by letter dated 26-3-2001, the respondent company denied the admitted dues of the petitioner and therefore, the petitioner was constrained to give counter reply dated 23-4-2001 stating that

outstanding dues of the General Stationary were clearly reflected in the books of accounts of the CPML and that a claim to that effect was at the relevant time lodged by the petitioner before the BIFR. It was also the case of the petitioner that even the BIFR in its review hearing of Case No.167/88 has categorically observed and referred to the claim of the petitioner. It is also the case of the petitioner that pursuant to the said order passed by the BIFR on 30-4-2002, a communication dated 2-5-2002 was addressed by the petitioner to the respondent company calling upon them to make payment of admitted dues of Rs.53,67,287.77paisa and in response to the same, the respondent by communication dated 27-7-2002 addressed to the petitioner calling upon it to furnish statement of account giving full details of these transactions. That by reply dated 5-8-2002, the petitioner communicated to the respondent that the petitioner's account was available with the respondent and that on reconciliation of accounts, the amount due and payable to the petitioner could be easily ascertained. It is further the case of the petitioner that with a view to avoid further controversy in the said matter, the petitioner furnished along with the said notice a statement of claim on the basis of the dues admitted by the respondent in 1992 and further admitted by the company before the BIFR in its review hearing and thus, the total amount due and payable to the

petitioner by the respondent company is Rs.56,26,190.52 paisa. As in spite of repeated requests and demands, the aforesaid amount was not paid, the petitioner served a statutory notice dated 30-9-02 required under section 434(1)(a) of the Companies Act, 1956 calling upon the respondent company to make payment of the said outstanding dues of Rs.56,26,190.52 paisa within 21 days, failing which the petitioner would approach the High Court for initiating appropriate proceedings of winding up. It is the case of the petitioner that in spite of the statutory notice served, the respondent company has neglected and failed to make the payment of outstanding dues and as the respondent company is unable to make the payment, the petitioner company has preferred the present petition for winding up of the respondent company.

3. Ms Amrita Thakore, learned advocate appearing on behalf of petitioner has vehemently submitted that right from 1992, the outstanding amount has been admitted by the company and even the same has been further confirmed by and/or on behalf of the respondent company before the BIFR at the time of hearing of Review Case No.167/88 which is reflected in the order passed by the BIFR dated 30-4-02. It is submitted that the learned counsel representing the respondent company mentioned before the BIFR on 30-4-02 that the company would give an undertaking to pay the said dues within 30 days. It is submitted

that in spite of the aforesaid facts, it does not lie in the mouth of the respondent company denying the liability. It is submitted that as the respondent company is unable to pay the debts due and payable to the petitioner, the respondent company has become commercially insolvent and therefore, it is requested to admit the present petition and pass an appropriate order of winding up of the respondent company.

4. Petition is opposed by Shri Paritosh Calla, learned advocate appearing for Nanavati Associates appearing for the respondent company. Affidavit-in-replies are filed on behalf of the respondent company. Further, additional affidavit-in-replies are also filed on behalf of the respondent company. The respondent company has disputed the debts. It is also submitted that even the petitioner has also filed civil suit being Suit No.2861 of 2005 regarding the same claim as made in the petition. It is submitted that right from 2002, more particularly, by communication dated 16-11-02, the petitioner was called upon to furnish the particulars in support of their claim. It is submitted that as the debt itself is disputed, it cannot be said that the same can be said to be a debt as contemplated by sections 433 and 434 and therefore, the winding up petition is not maintainable. It is also further submitted that even, otherwise, the respondent company is a very strong going concern and in support of the same, the unaudited financial

results dated 22-1-07 for the second quarter ended 31st March 2006 and a copy of annual report for the year 2005-06 of the respondent company are produced on record. It is submitted that the respondent company is making huge profits and in no circumstances, can it be said that the respondent company is unable to pay its debts and therefore, it is requested to dismiss the present petition. The learned counsel of the respondent company has relied upon the decision of the Hon'ble Supreme Court in the case of **Pradeshiya Industrial & Investment Corporation of U.P. V. North India Petrochemicals Ltd. And others reported in (1994) 3 SCC 348** as well as the decision of the Division Bench rendered in OJ Appeal No.23 of 2003 in the case of Graphite India Ltd. V. Nila Baurat Engieering Ltd., whereby the Division Bench has dismissed the OJ appeal confirming the order passed by the learned single Judge dismissing the winding up petition on the ground that the debt is disputed and therefore, the company petition for winding up is not maintainable. Making the above submissions, it is requested to dismiss the present petition.

5. Heard the learned advocates appearing for the parties.
6. It is the case of the petitioner that an amount of Rs.56,26,190.52 paisa is due and payable to the petitioner and the said debt was admitted in 1992 and thereafter, before the BIFR in April 2002 which is

reflected in the order passed by the BIFR dated 30-4-02. Now on considering the order dated 30-4-02, though it is reflected in the said order that the learned counsel representing the company mentioned that the company would give an undertaking to pay the dues within 30 days, it also borne out from the said order that it is not clarified as to what was the amount due to the petitioner as on the date of the sanction of the scheme. It also appears from the record that right from the very beginning, more particularly, prior to the statutory notice, the debt is disputed and even by communication dated 16-11-02, the petitioner was called upon to furnish the particulars in support of their claim of Rs.56,26,190.52 paisa. Thus, there are serious disputes with regard to the amount due and payable to the petitioner. It is also required to be noted that even thereafter, the petitioner has already filed the suit before the Bombay High Court being suit No.2861/05 regarding the same claim as made in the petition and the respondent has also filed his written statement putting forward its own case in the said suit. As held by the Hon'ble Supreme Court Pradeshiya Industrial & Investment Corporation of U.P. (supra), debt must be a determined or a definite sum, not a disputed or doubtful amount and winding up petition, merely for realizing debts due from the company cannot be allowed. It is further observed by the Hon'ble Supreme Court in the said decision that

when the company has questioned the maintainability of the petition on the ground that the claim itself being rightful requiring adjudication, it was not a debt as contemplated by sections 433 and 434 of the Companies Act, the winding up petition is not maintainable. In para 27 to 29, the Hon'ble Supreme Court has observed as under:

> ***27.What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and commercially insolvent that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities". (In European Life Assurance Society, Re; V. V. Krishna Iyer & Sons v. New Era Mfg. Co. Ltd.).***
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> ***28.While dealing with the scope of Section 433(e) this Court had occasion to hold the following [at page 131 in Madhusudan Gordhandas1 [the case relied on by***

learned Solicitor General)]: (SCC pp. 638-39, paras 20-22)

"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petitionfor winding-up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corpn., Re4. Again, a petition for winding-up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Horfold Hotel Co. Ltd.)

Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that

particular debt. (See A Company) Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding-up order but the exact amount of the debt is disputed the court will make a winding-up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd.) The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-Up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under Section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the Court may ascertain the wishes of the creditors. The

wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st Edn., page 742, as follows:

'This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding-up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds

***furnished by the creditors opposing the winding-up will have an important bearing on the reasonableness of the case. (See P. & J. Macrae Ltd.)*"**

29.It is beyond dispute that the machinery for winding-up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Rishnaswami this Court quoted with approval the following passage from Buckley on the Companies Acts, (1 3th Edn., p. 45 1):

"It is well-settled that 'a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court'."

7. However, it is the contention of the petitioner that the defence must be a substantial one and not mere moonshine. However, looking to the facts and

circumstances of the case and when the amount due and payable to the petitioner is disputed from the very beginning and when the petitioner has already filed by now the civil suit for the same amount for which the company petition is filed, without expressing any further opinion on merits with regard to amount due and payable to the petitioner as it may ultimately affect the rights of the respective parties, suffice it to say that the defence raised is a substantial one which is required to be adjudicated by the civil Court on appreciation of evidence. There is another reason also for not admitting the present winding up petition. Looking to the latest financial balance sheet, it appears to the Court that the respondent company is a strong going concern, is also making profit and therefore, it cannot be said that the respondent company has become commercially insolvent and is unable to pay debt to the creditors which warrants the order of winding up. Considering the facts and circumstances of the case as stated hereinabove and the decision of the Hon'ble Supreme Court, it cannot be said that the respondent company has become insolvent which is required to be wound up.

8. For the reasons stated above, the company petition fails and deserves dismissal and is accordingly dismissed.

(M.R. SHAH, J.)

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